



607 Fourteenth Street N.W.  
Washington, D.C. 20005-2003  
PHONE: 202.628.6600  
FAX: 202.434.1690  
www.perkinscoie.com

**BY FACSIMILE AND ELECTRONIC MAIL**

June 8, 2009

Steven T. Walther  
Chairman  
Federal Election Commission  
999 E Street, N.W.  
Washington, DC 20463

Comment on  
ADR 2009-13

**Re: AOR 2009-13**

Dear Mr. Chairman:

On behalf of our clients, the Democratic National Committee, the Democratic Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee, we write to comment on Advisory Opinion Request 2009-13.

On cursory facts, the request invites the Commission to change radically the limits which apply when groups of people spend money together on express advocacy communications, and to contradict positions the agency is now defending in federal court. On the sparse facts presented, the Commission should tell Requestor that it and its clients may become a "political committee" under 2 U.S.C. § 431(4) if they engage in the proposed activity.

This request is about whether a group of individuals may pool unlimited funds for the major – indeed, exclusive – purpose of making independent expenditures in federal elections. The law provides that a "group of persons" becomes a political committee when it "makes expenditures aggregating in excess of \$1,000 during a calendar year ..." 2 U.S.C. § 431(4)(A). It provides further that no one person may provide more than \$5,000 to the group in a calendar year, including in-kind contributions. *See id.* § 441a(a)(1)(C).

04031-0001/LEGAL16334502.1

ANCHORAGE · BEIJING · BELLEVUE · BOISE · CHICAGO · DENVER · LOS ANGELES · MENLO PARK  
OLYMPIA · PHOENIX · PORTLAND · SAN FRANCISCO · SEATTLE · SHANGHAI · WASHINGTON, D.C.

Perkins Coie LLP and Affiliates

The Commission is now defending the \$5,000 limit in federal court. At its behest, the United States District Court for the District of Columbia denied a request to enjoin enforcement of the \$5,000 limit when applied to the activities of individuals who, like Requestor's clients, seek to pool their resources to make independent expenditures. *See SpeechNow.org v. FEC*, Civ. No. 08-0248 (D.D.C. July 1, 2008) (memorandum order denying preliminary injunction).

Requestor is now asking the Commission to vitiate the \$5,000 limit. It wants to reach through the back door the same result that the plaintiffs seek in *SpeechNow*. It comes to the Commission with an array of unidentified spenders – some of whom it "intends to approach," and others whom it expects to "be approached by ...." It anticipates that multiple spenders "will sponsor independent expenditures for or against the same federal candidate." It plans to manage a stable of consultants who would prepare independent expenditure communications for all the spenders. It plans to "facilitate communications" among the spenders through conference calls, meetings, and "passing along messages." It presents no limit whatsoever on how the spenders would interact, nor on how it would arrange their activities, except that each spender would have so-called "ultimate control" over "timing, placement and method of communication," and over the identity of the candidate referenced in its ads.

Thus, Requestor is asking the Commission to allow its clients to pool money for independent expenditures in excess of section 441a(a)(1)(c)'s \$5,000 limit. The Commission has been consistently leery of such ventures before. It has asked requestors to make additional representations before endorsing their activities through the advisory opinion process. For example, in Advisory Opinion 2009-02 – the only opinion cited by Requestor – the Commission relied on representations that the requesting LLC's sole member had "exclusive control" over how his funds would be spent – not "ultimate control," which vaguely implies the involvement of others. It relied on the "total unity" between the member and the LLC, and warned that, "should circumstances change," the LLC may become a political committee.

Similarly, in Advisory Opinion 2008-10 – which, like the instant request, was sought by a vendor who proposed to serve multiple independent spenders – the requestor represented that it did "not facilitate or promote any communication or sharing of information" between the creators and purchasers of ads. It offered "no mechanism ... to provide for such collaboration ...." The Commission relied on the absence of "communication or prearrangement" between the creators and purchasers of the ads to find that the vendor and its customers would not become a political committee under section 431(4). It relied

Steven M. Walther  
June 8, 2009  
Page 3

on the fact that the vendor would not facilitate communications among the others involved, and that it would not convey information from one customer to another. It did not address, but plainly held open the possibility that communications among others could result in political committee status. It indicated that "communication between or among the purchasers," or communications by the vendor "with purchasers about other purchasers" might trigger political committee status.

Finally, in Advisory Opinion 1986-38, the Commission assured an independent spender that he would not trigger political committee status merely by paying for advertisements with personal funds. But the Commission assumed that he "will be acting by himself and not on behalf of any group in undertaking this activity."

A close comparison with these opinions shows that there is no clear, supportable way to approve Requestor's proposed conduct without acknowledging that it and its clients may become a political committee.

The consequences of a swift, credulous approval of the request would be significant. As noted above, the Commission would subvert its position in the *SpeechNow* litigation, by road-mapping a way to reach the same result sought by the plaintiffs. And the consequences for party committees like our clients would be no less severe. By allowing unlimited contributions to fund independent expenditures, with no sound basis in the Federal Election Campaign Act or the Bipartisan Campaign Reform Act, the Commission would seriously disrupt the balance Congress sought to create in McCain-Feingold so as to preserve the most vibrant role possible for the parties.

We appreciate the opportunity to comment on this request.

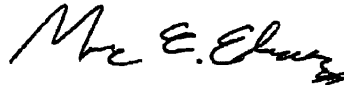
Steven M. Walther  
June 8, 2009  
Page 4

Very truly yours,

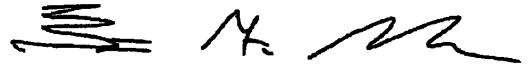
PERKINS COIE LLP



Robert F. Bauer



Marc E. Elias



Brian G. Svoboda

Counsel to the Democratic National Committee, the Democratic Senatorial Campaign  
Committee and the Democratic Congressional Campaign Committee

cc: Vice Chairman Petersen  
Commissioner Bauerly  
Commissioner Hunter  
Commissioner McGahn  
Commissioner Weintraub  
Thomasenia Duncan, Esq., General Counsel